

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

1 BRIAN GRAHAM, individually,

Case No. 2:14-cv-01949-MMD-NJK

2 Plaintiff,

ORDER

3 v.

4 THE MIRAGE CASINO HOTEL, a Nevada
5 corporation, DOES 1-10, inclusive, ROE
6 CORPORATIONS 1-10, inclusive,

7 Defendants.

8

I. SUMMARY

9 This case involves an employment dispute. Before the Court is Defendant's
10 Motion for Partial Dismissal of Plaintiff's Amended Complaint Pursuant to Fed. R. Civ.
11 P. 12(b)(6) ("Motion"). (Dkt. no. 19.) Plaintiff has filed a response (dkt. no. 20) and
12 Defendant has replied (dkt. no. 21). For the reasons discussed herein, the Motion is
13 granted.

14

II. BACKGROUND

15 The following facts are taken from Plaintiff's Amended Complaint ("Complaint").
16 (Dkt. no. 15.) Plaintiff alleges that he is a Caucasian male who is over the age of forty.
17 He was employed with Defendant from 1999 until September 2, 2014. (*Id.* at 2.)
18 Plaintiff's last position before his termination was Facility Manager. During the last year
19 of his employment, between 2013 to 2014, Plaintiff's supervisor was an African
20 American male. (*Id.*) Plaintiff alleges that he was subjected to discriminatory conduct
21 and harassment based on his race and age, and his employment was ultimately
22 terminated.

1 terminated in retaliation for his charge of discrimination. (*Id.* at 2-3.) He asserts as his
 2 first claim for relief violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000
 3 et. seq., the Age Discrimination in Employment Act, 29 U.S.C. § 621 et. seq. and
 4 Nevada state law. (*Id.* at 3-4.) Plaintiff further asserts three additional claims for
 5 negligent supervision, wrongful termination and retaliation. (*Id.* at 4-6.)

6 **III. LEGAL STANDARD**

7 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which
 8 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
 9 provide "a short and plain statement of the claim showing that the pleader is entitled to
 10 relief." Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
 11 The Rule 8 notice pleading standard requires Plaintiff to "give the defendant fair notice
 12 of what the . . . claim is and the grounds upon which it rests." *Id.* (internal quotation
 13 marks and citation omitted). While Rule 8 does not require detailed factual allegations, it
 14 demands more than "labels and conclusions" or a "formulaic recitation of the elements
 15 of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550
 16 U.S. at 555). "Factual allegations must be enough to rise above the speculative level."
 17 *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must
 18 contain sufficient factual matter to "state a claim to relief that is plausible on its face."
 19 *Iqbal*, 556 U.S. at 678 (internal quotation marks omitted).

20 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
 21 apply when considering motions to dismiss. First, a district court must accept as true all
 22 well-pleaded factual allegations in the complaint; however, legal conclusions are not
 23 entitled to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of
 24 action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a
 25 district court must consider whether the factual allegations in the complaint allege a
 26 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's
 27 complaint alleges facts that allow a court to draw a reasonable inference that the
 28 defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not

1 permit the court to infer more than the mere possibility of misconduct, the complaint has
2 “alleged — but not shown — that the pleader is entitled to relief.” *Id.* at 679 (internal
3 quotation marks omitted). When the claims in a complaint have not crossed the line
4 from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at
5 570. A complaint must contain either direct or inferential allegations concerning “all the
6 material elements necessary to sustain recovery under *some* viable legal theory.” *Id.* at
7 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989)).

8 **IV. DISCUSSION**

9 Defendant seeks to dismiss Plaintiff’s first claim to the extent it alleges a hostile
10 work environment theory of discrimination and the second, third and fourth claims for
11 relief. (Dkt. no. 19.) In response, Plaintiff does not oppose dismissal of the fourth claim
12 for retaliation since he has alleged retaliation as part of his first claim for relief. (Dkt. no.
13 20 at 8.) Defendant counters that Plaintiff’s retaliation claim is insufficient whether
14 treated as a stand-alone claim or as part of the first claim for relief. Plaintiff indicates he
15 does not oppose dismissal of the second and third claims for negligent supervision and
16 wrongful termination. (*Id.*) In light of Plaintiff’s concession as to dismissal of his second
17 and third claims for relief, the Court will only address Defendant’s arguments that the
18 Complaint fails to state a claim for hostile work environment discrimination and for
19 retaliation.

20 **A. Hostile Work Environment**

21 Defendant contends that Plaintiff has failed to sufficiently plead the essential
22 elements of his claim of discrimination based on a hostile work environment. The Court
23 agrees.

24 “Hostile environment” harassment refers to situations where employees work in
25 offensive or abusive environments. *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991).
26 “Title VII affords employees the right to work in an environment free from discriminatory
27 intimidation, ridicule, and insult.” *Meritor Sav. Bank, SFV v. Vinson*, 477 U.S. 57, 65
28 (1986) (citation omitted). Title VII is not a “general civility code.” *Faragher v. City of*

1 *Boca Raton*, 524 U.S. 775, 788 (1998). A hostile work environment claim requires a
2 plaintiff to establish three essential elements: (1) plaintiff was “subjected to verbal or
3 physical” because of his race or age; (2) “the conduct was unwelcome;” and (3) “the
4 conduct was sufficiently severe or pervasive to alter the conditions of the victim’s
5 employment and create an abusive working environment.” *Manatt v. Bank of America*,
6 339 F.3d 798, 798 (9th Cir. 2003) (citation omitted).

7 Plaintiff alleges that the discriminatory conduct to which he was subjected
8 consisted of “unfair criticism, unfair negative evaluations and reviews; unequal
9 treatment compared to employees of other races; disparate treatment as opposed to
10 other similarly situated employees of the Defendant; being placed on a performance
11 improvement plan which was implemented to assist in terminating Plaintiff; the denial of
12 various workplace rights and protections by Defendant; retaliatory conduct directed at
13 the Plaintiff including a wrongful termination and other adverse conduct which created
14 an overall pervasive hostile work environment.” (Dkt. no. 15, ¶ 10.) These allegations
15 fail to support a claim for hostile work environment. Plaintiff does not allege what verbal
16 or physical conduct he was subjected to or whether the conduct was sufficiently severe
17 as to alter his work environment. Plaintiff alleges “ongoing harassment” that “created an
18 overall hostile work environment.” (*Id.*, ¶ 11.) However, such formulaic recitation, without
19 any factual allegations, fails to meet Rule 8’s pleading requirements. See *Twombly*, 550
20 U.S. at 555.

21 The Complaint fails to state a claim for discrimination based on a hostile work
22 environment in the first claim for relief.

23 **B. Retaliation**

24 Defendant argues that Plaintiff cannot meet the heightened “but for” causation
25 standard established under *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517
26 (2013). Plaintiff counters that at the pleading stage, he is not required to satisfy this
27 heightened requirement. The Court agrees with Plaintiff. In *Nassar*, the Supreme Court
28 addressed the proper standard of causation for retaliation claim under Title VII. The

1 Court determined that “Title VII retaliation claims must be proved according to traditional
 2 principles of but-for causation, not the lessened causation test stated in § 2000e-2(m).”
 3 *Id.* at 2533. The Court did not modify the prima facie case of a retaliation claim.

4 To establish a prima facie case of retaliation, a plaintiff must show that (1) he
 5 engaged in an activity protected under Title VII, (2) “the employer subjected him to an
 6 adverse employment action, and (3) there was a causal link between the protected
 7 activity and the employer’s action.” *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir.
 8 1987). Plaintiff has failed to plead sufficient facts to establish a prima facie case.

9 Plaintiff alleges he filed a charge of discrimination with the Nevada Equal Rights
 10 Commission in 2014. (Dkt. no. 15, ¶ 26.) Plaintiff generally claims that “Defendant
 11 wrongfully terminated Plaintiff in a retaliatory manner after the filing of his charge of
 12 discrimination. (*Id.*, ¶ 12.) In his first claim for relief, Plaintiff makes only general
 13 references to retaliation. (*Id.*, ¶ 15.) Such conclusory allegation is insufficient to state a
 14 claim. Thus, while Plaintiff concedes dismissal of his fourth claim for relief as being
 15 redundant since his first claim includes a claim for retaliation, the Court finds that the
 16 first claim does not state such a claim.

17 The fourth claim for relief appears to satisfy Rule 8’s pleading requirements to
 18 the extent Plaintiff is asserting a claim for retaliation under Title VII. Plaintiff alleges that
 19 he was subjected to “adverse and retaliatory conduct,” including “unfounded disciplinary
 20 actions and being placed on an [sic] performance improvement plan designed to harm
 21 the Plaintiff,” and termination in September 2014. (*Id.*, ¶ 27.) He alleges that
 22 Defendant’s retaliatory conduct “is causally linked to Plaintiff’s exercise of protected
 23 conduct.” (*Id.*, ¶ 28.) However, Plaintiff does not identify whether the fourth claim is
 24 based on Title VII or state law.

25 Because of the foregoing deficiencies, the Court will dismiss Plaintiff’s retaliation
 26 claim, whether stated as part of the first claim or as a stand-alone fourth claim for relief.

27 ///
 28 ///

1 **C. Leave to Amend**

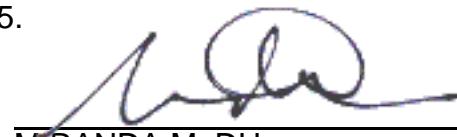
2 Plaintiff requests leave to amend to assert a claim for discrimination based on a
 3 hostile work environment should the Court find that this claim is not sufficiently pled.
 4 Because the Court “should freely give leave to amend when justice so requires,” the
 5 Court will grant Plaintiff leave to amend to assert a claim for hostile work environment
 6 discrimination and retaliation. See Fed. R. Civ. P. 15(a)(2); *Lucas v. Dep’t of Corr.*, 66
 7 F.3d 245, 248 (9th Cir.1995) (“unless it is absolutely clear that no amendment can cure
 8 the defect . . . a pro se litigant is entitled to notice of the complaint’s deficiencies and an
 9 opportunity to amend prior to dismissal of the action.”); *Lopez v. Smith*, 203 F.3d 1122,
 10 1130 (9th Cir. 2000) (stating that the Ninth Circuit has repeatedly held that “a district
 11 court should grant leave to amend even if no request to amend the pleading was made,
 12 unless it determines that the pleading could not possibly be cured by the allegation of
 13 other facts.”).

14 **V. CONCLUSION**

15 The Court notes that the parties made several arguments and cited to several
 16 cases not discussed above. The Court has reviewed these arguments and cases and
 17 determines that they do not warrant discussion as they do not affect the outcome of
 18 Defendant’s Motion.

19 It is therefore ordered that Defendant’s Motion for Partial Dismissal of Plaintiff’s
 20 Amended Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) (dkt. no. 19) is granted. The
 21 second and third claims for relief are dismissed. The claims for discrimination based on
 22 a hostile work environment (part of the first claim) and claims for retaliation (part of the
 23 first claim and the fourth claim) are dismissed without prejudice and with leave to
 24 amend. Plaintiff is given fifteen (15) days to file an amended complaint.

25 DATED THIS 4th day of September 2015.



26
 27 MIRANDA M. DU
 28 UNITED STATES DISTRICT JUDGE